STANDARD CHARTERED BANK

v.

TIONG NGIT TING

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[CIVIL APPEAL NO: R1-12-210-1992]
8 MARCH 1997

BANKING: *Banker and customer - Deposit account - Whether fixed deposit account - Required period of deposit and rate of interest returnable*

BANKING: *Banks and banking business - Fixed deposit account - Fixed deposit certificate presented 32 years after date on certificate - Whether bank must pay principal amount and interest - Whether presumption that debt had been paid could arise*

EVIDENCE: *Witness - Discrepancy in evidence - Whether material*

The respondent ('the plaintiff') had brought an action in the Sessions Court against the appellant ('the defendant'), as the successor-in-title of the Chartered Bank of India, Australia and China, for the repayment of the sum of RM10,000 and all interest accrued thereon in respect of a fixed deposit receipt dated 17 September 1955 ('P1'). P1 did not contain the period of deposit nor the applicable rate of interest. The plaintiff averred in her statement of claim that there was no term fixed for the withdrawal of the deposit, and due to an oversight, she had discovered P1 only in 1987 from her attorney's personal effects. The defendant, however, denied the claim and averred that P1 was not a certificate of deposit, and that the principal amount had been withdrawn. It relied on the doctrine of laches and the statute of limitation. The defendant further averred that if the deposit had not been withdrawn, it would have become 'unclaimed monies' under the Unclaimed Monies Act 1965 ('the Act'). The defendant's enquiry with the Registrar of Unclaimed Monies ('the Registrar'), drew a blank.

In interrogatories filed before the trial, the defendant admitted that the plaintiff had a fixed deposit account with the defendant and that its practice was to require a depositor to surrender the fixed deposit certificate to withdraw the deposit. It was however unable to provide any record of the withdrawal of the deposit as it related back to 1955 and the register of fixed deposits was retained only for a period of ten years.

The Sessions Court judge allowed the plaintiff's claim and the defendant appealed.

Held:

[1] For a fixed deposit to be so called, there must be a term fixed as to the period of the deposit and the rate of interest. If no period of maturity is determined by the parties to the contract, then the deposit cannot be in respect of a fixed deposit account.

[2] The burden was on the plaintiff to satisfy the court on a balance of probabilities that the maturity period of the deposit was not determined and not for the appellant to supplement the lacuna in the evidence by providing the maturity date and interest rate. Where no claim for monies is made after a considerable lapse of time, a presumption that the debt had been paid could arise.

[3] As no date of maturity had been proved, it was impossible to determine when time began to run on the cause of action for the purpose of calculating limitation.

[4] Under the Act, monies left dormant in a bank for seven years would become unclaimed monies. The submission that the maturity date should be taken as being 1961, ie, seven years from the date of the deposit, was however erroneous. The Act has nothing to do with the determination of the maturity period of a fixed deposit. It deals with unclaimed monies under s. 8 which includes any monies, including interest, to the credit of an account that has not been operated for a period of not less than seven years.

[5] In this case, the discrepancy with regard to the retention of the deposit register was not material in view of the general conduct of the defendant by going out of its way to trace the monies with the Registrar. On the evidence as a whole, the plaintiff had failed to establish her case on a balance of probabilities. The Sessions Court judge had misdirected himself in assessing the evidence before him as his decision was against the weight of the evidence.

[Appeal allowed.]

Cases referred to:

Douglass v. Lloyds Bank Ltd [1929] 34 Com Cas 263 ***(refd)***

Foley v. Hill [1848] 2 HLC 28 ***(refd)***

Voo Foot Yiu v. Oversea Chinese Banking Corporation Ltd [1936] MLJ Rep. 169 ***(dist)***

Legislation referred to:
Limitation Act 1953, ss. 6(1)
Unclaimed Moneys Act 1965, s. 8

Other sources referred to:
Law of Banking, Poh Chu Chai, 2nd Edn., p. 45
The Modern Banking Law, E.P. Ellinger, p. 81

For the appellant - Chang Wei Mun; M/s Raja, Darryl & Loh
For the respondent - Charanjit Singh Saini; M/s Radzi Sheikh Ahmad, Peri & Saini

Reported by Anne Khoo

JUDGMENT

Abdul Kadir Sulaiman J:

This is an appeal by the appellant who was the defendant in the court below against the decision of the learned sessions judge allowing the claim of the respondent who was the plaintiff. On 30 January 1997 upon completion of the hearing of the appeal I made an oral decision allowing the appeal. Against that decision the respondent now appeals to the Court of Appeal. I now give my reasons.

The respondent issued a summons dated 18 November 1987 in the sessions court against the appellant, the successor in title of the Chartered Bank of India, Australia and China, claiming against the appellant a sum of $10,000, all interest accrued thereon from 17 September 1955 to date of payment at the relevant rates of interest prevailing during the deposit period, costs and such further or other relief as the court may deem just and expedient, in respect of a purported fixed deposit account with the appellant bank based on exh. "P1" in her possession which content is as follows:

> The Chartered Bank of India,
> Australia & China.
> P.O. Box No. 1001.
> Kuala Lumpur,
>
> 17th SEPT 1955
>
> To
>
> Miss Tiong Ngit Ting,
>
> DEAR SIR,
>
> We have to-day credited your Fixed Deposit account with the sum of $10,000 being …

Yours faithfully

Sgd.

…

Sub-Accountant.

In her statement of claim the respondent avers that there was no term fixed for the withdrawal of the said deposit. Due to oversight she only discovered the said exh. "P1" in early 1987 from her attorney's personal effects. The appellant failed to meet the demand made for the repayment to her of the said principal amount and interest due to her. Hence the claim.

In its statement of reply the appellant denies the claim and avers that even if there was such a deposit the said principal amount had been withdrawn by the respondent. The appellant also avers that the said exhibit is not a certificate of deposit in respect of any amount placed on fixed deposit with it. The appellant would rely on the doctrine of laches and the statute of limitation in relation to the claim of the respondent.

Interrogatories were ordered against the appellant before the trial of the action. In answer to the interrogatories by the respondent, the appellant admitted that the respondent had a fixed deposit account with the appellant bank on 17 September 1955, the date shown in exh. "P1", wherein $10,000 was credited into the account on that date. It admitted that the exhibit was on the letterhead of its successor in title. As to whether the said deposit had been repaid to the respondent with accrued interest, the answer given was that the practice of the appellant in regard to fixed deposit were and are that on the opening of a fixed deposit account, a fixed deposit certificate or receipt printed on security paper would be issued to the depositor. The depositor would have to surrender the fixed deposit certificate or receipt to withdraw the deposit. However, in this particular case, the appellant is unable to provide any record of the withdrawal of this fixed deposit as this related back to 1955, and the practise of the appellant was and is to retain the register of fixed deposits issued and paid for a period of ten years only. The register now kept by the appellant does not show the alleged fixed deposit at all, indicating that the fixed deposit must have been withdrawn. Further, if the said deposit was not withdrawn, then it would have come within the meaning of unclaimed money under the Unclaimed Monies Act 1965 (hereinafter referred to as 'the 1965 Act'). The appellant wrote to the Registrar of Unclaimed Monies (hereinafter referred to as 'the Registrar') on the matter and the reply received from the Registrar was that they do not have on their register the particulars in respect of the said deposit. The reply to the interrogatories goes further to state that the above facts indicate that the amount of the fixed deposit must have been

withdrawn sometime prior to the coming into effect of the 1965 Act upon the presentation of the certificate so issued. As to the receipt or documentary proof of repayment of the said RM10,000 the appellant answered the interrogatories that since it is the practice of the appellant to retain the register of fixed deposit issued and paid only for a period of 10 years, the receipt or documentary proof of the repayment is no longer available.

At the trial of the action before the learned sessions court judge the respondent and her attorney who is her brother gave evidence for the plaintiff and the appellant called one witness, the manageress of the appellant bank who started work there only in 1970. At the end of the trial the learned judge allowed the claim of the respondent and ordered the appellant to pay the respondent the sum of RM10,000 claimed together with "faedah lazim kadar fixed deposit" (the usual rate of interest on fixed deposit) from 17 September 1955 until payment and costs of RM1,500. Hence this appeal by the appellant against the said decision.

In the trial the respondent relies on exh. "P1" to support her claim. She testified that she never withdrew the amount since its deposit in 1955. She did not claim the amount for 37 years because the said exhibit was kept by his brother in his safe. She did not have any other documents other than the exhibit to support her claim. Her brother, PW2 confirmed that he kept the exhibit in his safe since 37 years ago and no other documents kept together with it. For the defendant it was testified that it was the practice of the bank since 1941 to issue to the depositor of a fixed deposit with a deposit receipt as in exh. "D1", and since 1956 the deposit receipt is in the form of exhibit "D2". This is to enable the depositor to produce to the bank to withdraw the deposit when due. Any deposit not claimed after 7 years, will be remitted under 1965 Act. Upon receiving the demand made by the respondent, the bank inquired from the Registrar who informed that the particulars of the respondent are not in their record.

On the evidence before the court the learned judge allowed the claim of the plaintiff. On the issue of limitation the learned judge by implication accepted that the claim of the respondent was made within time upon his satisfaction of the explanation given by the respondent that the delay was due to oversight on the part of the respondent who overlooked the said exh. "P1" and discovered it only in 1987 from his brother's personal effect. Treating the evidence of both the witnesses for the respondent as creditworthy the learned judge held that the court has to protect the individual like the respondent in the face of the appellant, a gigantic financial institution. He also gave his reason for holding in favour of the respondent on the ground that there is no evidence from the appellant that there were standing orders or other conditions

imposed by the bank either written or oral which clearly stated that in order for a depositor to withdraw his deposit he must produce to the bank or having in his possession a deposit receipt in the form of Exhs. "D1" and "D2. The court, he held, must give protection to the poor client even though there was some defects in relation to exh. "P1" which defect is not fatal to the respondent's claim. The learned judge must have misconstrued the decision in *Voo Foot Yiu v. Oversea Chinese Banking Corporation Ltd.* [1936] MLJ Rep. 169 in dealing with the express clause contained in the deposit receipt there that the amount deposited is "repayable on production of this receipt". In that case, the plaintiff produced the deposit receipt to the defendant bank but the bank refused to honour the receipt on the ground that the amount of the deposit had earlier on been paid to a fraudulent third party.

In dealing with this appeal one should not lose sight of the nature of claim instituted by the respondent against the appellant in the court below. The claim is founded on an alleged fixed deposit amount placed by the respondent in 1955 with the respondent bank as so stated in exh. "P1". The appellant does not deny that based on exh. "P1" a sum of RM10,000 was deposited with its predecessor in title. But it denies that the said exhibit is a deposit receipt normally issued by the bank since 1941 and subsequently modified in 1956 as in the form of Exhs. "D1" and "D2" respectively which production would oblige the bank to honour the tenderer of the receipt with the amount stated therein. Be that as it may, being a fixed deposit as so contended by the respondent in his claim what are its term in order for the deposit to be so called? This is relevant and more so for determining the limitation period to file an action for its recovery. The respondent herself by the statement of claim avers that the maturity period (was) not determined. The burden is on the respondent as the plaintiff in this case to satisfy the court on the balance of probability and not for the appellant as the defendant to prove that the amount deposited has been withdrawn. We know from the banking practice that a bank offers services for various types of account such as current, saving or fixed deposit accounts. Take the case of a current account operated by a client of the bank. The client uses cheques to be issued authorising the bank to make payment as so directed and after carrying out the authorization the bank debits the amount so paid out from the running account of the client kept by it. From time to time, the client makes deposits into his current account with the bank. He pays in the amount of the deposit to the bank by using what is known as a pay-in slip. The client keeps a copy of this pay-in slip after each deposit had been acknowledged by the bank. He keeps all the pay-in slips in respect of all his deposits. Can he use the pay-in slips as evidence to entitle him to draw out a cheque at any given time for the equivalent amount stated in the

various pay-in slips in his possession which he produces without regard to previous cheques issued by him in relation to the amount, to require the bank to honour his said cheque?

Now for a fixed deposit account, in order for it to be so called, there must be terms fixed which the parties which in this case, the respondent as the depositor and the appellant as the bank, must agree in order to bind the appellant in its contract with the respondent. Being a fixed deposit the parties must at least agree as to the period of the deposit and the rate of interest returnable to the respondent in respect of the deposit upon maturity. The deposit matures at the end of the period of the deposit agreed upon. However, in this case, there is nothing in the evidence before the learned judge as to what these terms were. As stated in *The Modern Banking Law* by E.P. Ellinger at p. 81:

> The relationship of banker and customer is most easily understood when one reflects on the nature of the agreement between them. It is agreed that an amount, equal to that deposited, has to be repaid by the bank. In the case of a current account … the amount is repayable, without interest, against the customer's demand. The right to draw on the funds by means of cheques and money transfers constitutes the benefit derived by the customer from his deposit of his money with the bank. In the case of a fixed deposit, or of money paid to the credit of a savings account, the amount is repayable either at a determined date or at call with the addition of interest ...
>
> The essence of the contract of banker and customer is, therefore, the bank's right to use the money for its own purposes and its undertaking to repay an amount equal to that paid in, with or without interest, either at call or at a fixed time.

By his claim the respondent asserts that exh. "P1" is evidence of the amount of his fixed deposit with the appellant. But what is the term of that fixed deposit? Exh. "P1" does contain all the essential terms for the deposit of the sum of RM10,000 on 17 September 1955 to be a fixed deposit. In fact in his statement of claim he avers that there was no term fixed for the withdrawal of the deposit. On the other hand, the appellant in answer to the interrogatories acknowledged the receipt of RM10,000 to the credit of the respondent's fixed deposit account on 17 September 1955. But that answer given by the appellant would not help the respondent in proving that the said amount of RM10,000 so received by the appellant on 17 September 1955 was in law a fixed deposit owing to the absence of its term to determine its maturity period. At the most, in the light of the answer given by the appellant, the respondent on that date had a fixed deposit account with the appellant bank which terms are not disclosed in the evidence by the respondent either directly or through the evidence by the appellant. Such being the case, it would not be possible to

determine the period the cause of action to begin for the purpose of calculating the period in regard to the limitation period. It is recognised in *Foley v. Hill* [1848] 2 HLC 28 that the limitation period would commence to run from the date of an unmet demand and not from the date of the deposit. The learned author in *Modern Banking Law* at p. 83 has this to say:

> Four observations need to be made as regards the general principle derived from *Foley v. Hill* and the *Joachimson* case. First, the need for a demand exists only in the case of a current account or of a savings account which provides for payment at call. In the case of a fixed deposit, maturing at a predetermined time, the amount involved becomes payable on the designated day. If the customer has not asked that the deposit be renewed on maturity, the bank pays the amount involved to the credit of the customer's current account. This is acceptable banking practice.

The second to the fourth observations by the learned author are not relevant to this case. It would be seen from the relevant first observation that in the case of a fixed deposit account the amount becomes payable on a predetermined designated day which in the present case is never established and for that reason the finding of the learned judge on the issue of limitation was correct but not for the reason given by him. It is for the reason that the period of limitation does not begin to run on the pleading of the respondent that his claim is founded upon the fixed deposit amount deposited with the appellant as the maturity period is not established.

However before the learned judge both the parties got confused over the period of the deposit by the respondent by relating it to the period of seven years prescribed by the 1965 Act. DW1 for the appellant in her evidence in answer to cross-examination as to whether one can keep his money (with the bank) for more than 7 years, testified that one could, (but) the depositor has to come to the bank to renew the expired period, thereby giving the impression that in the respondent's case there was an implied term of depositing her money with the appellant for a term of seven years. This impression if entertained is fallacious. The 1965 Act has nothing to do with the determination of the period of maturity of a fixed deposit. In this appeal before me the learned counsel for the appellant by his submission confirmed the erroneous impression as to the maturity date of the respondent's deposit to be in 1961 taking the period of 7 years mentioned in the 1965 Act though he contended that in the absence of the deposit receipt produced by the respondent the actual maturity date is not known. He submitted so on the issue of determining the limitation period of 6 years prescribed by s. 6(1) of the Limitation Act 1953 (Act 254) in respect of action founded on a contract. He submitted that the claim of the respondent was made outside the limitation period which began to run from 1962 whilst the claim was filed only in 1987, a delay of about 19 years. For

the reason stated I cannot accept the basis for determining the limitation period in this case. The 1965 Act has nothing to do with the determination of the maturity period of a fixed deposit by a depositor with any bank. It has to do with unclaimed money which by definition in s. 8 thereof includes any moneys, including any interest whensoever paid thereon, to the credit of an account that has not been operated by a person entitled to any unclaimed moneys either by deposit or withdrawal for a period of not less than seven years. Therefore, in the case of a fixed deposit the maturity date is to be determined by the parties to the contract. If this is not determined then the deposit cannot be in respect of a fixed deposit account.

From exh. "P-1"there is a statement that on 17 September 1955 the respondent was credited with the sum of RM10,000 to his fixed deposit account. The appellant confirmed this fact. But will the exhibit on its production by the respondent oblige the appellant to meet the demand? The appellant by its evidence testified that since 1941 a security paper in the nature of exh. "D1" was issued to a depositor for him to produce to the bank to withdraw his deposit. After 1965 a deposit receipt in the nature of exh. "D2" was issued to a depositor for the same purpose. Only on the production of the document in the nature of the said exhibits by the depositor will he be allowed to withdraw his deposit. In this case, the respondent as a depositor was unable to produce the document in the nature of the two exhibits. Therefore, it is the contention of the appellant that at any time earlier the respondent must have withdrawn the amount. That explains her failure to produce the same. To do justice to the respondent, I would say, the appellant even went out of its way to find out from the Registrar in the event that after the statutory period the said deposit might have been remitted to the Registrar under the 1965 Act but there was none. Poh Chu Chai in his book, *Law of Banking* (2nd Edn.) has this to say on the presumption of payment at p. 45:

> When a customer is in possession of a receipt issued by a bank for money deposited with the bank, the receipt constitutes *prima facie* evidence against the bank of a debt owing to the customer. Equally, if no claim has been made by a customer for the repayment of the debt after a considerable lapse of time, a presumption that the debt had been paid could arise.

Now what is the incidence of the documents in the nature of exh. "D1" or "D2" and exh. "P1"? As discussed earlier, a fixed deposit account is distinct from a saving or a current account in that it has a predetermined period agreed by the parties. From the evidence of the appellant in the court below in the case of a fixed deposit a document in the nature of exh. "D1" or "D2" would be issued by the bank to a depositor for such an account. To withdraw the said deposit the depositor is required to produce the document as proof of his deposit with the bank. Exhibit "D1" is printed as a deposit receipt bearing

a reference number, the date, the name of the depositor, the amount deposited, the rate of interest per annum and most importantly the period of the deposit. Exhibit "D2" contained all the information found in exh. "D1" except for the form of the deposit receipt itself. On the other hand, exh. "P1" does not contain all the important particulars like the rate of interest and most importantly the period of the deposit. As such the term period of the deposit is not ascertained. In the circumstances, the said exhibit cannot be taken to mean a fixed deposit receipt even though on it the appellant had acknowledged the credit of the amount to the respondent's fixed deposit account. Taking the practice of the banking institution that we know of, at the most exh. "P1" can be equated to a pay-in slip I mentioned earlier in respect of a deposit in the current account which does not oblige a banker to honour it upon presentation just as would oblige it to do upon presentation of the proper deposit receipt in the nature of exh. "D1" or "D2". Exhibit "P1" in the absence of the term of the deposit to turn it into a deposit receipt for a fixed deposit, cannot be taken to be a fixed deposit receipt upon its production would oblige the appellant to allow the necessary withdrawal of the deposit. Following the practice of the appellant there would be issued a deposit receipt to enable the respondent to use it for the purpose of the withdrawal of the deposit when the period of the deposit matures. It is common knowledge that the amount of $10,000 was not a meagre amount in 1955 and it is unreasonable to expect the respondent to have forgotten altogether about this deposit of hers until 1987 when she discovered exh. "P1" which is not a deposit receipt in the context of the business of the respondent if at all true that she had never withdrawn the said amount. The position of the respondent is even worst than that of the executor of Mr. Fenwicke's estate in *Douglass v. Lloyds Bank Ltd.* [1929] 34 Com. Cas. 263 cited at p. 45 in *Law of Banking* (2nd Edn.) mentioned earlier though in that case the delay was of some 61 years when in this case the respondent was not even able to produce the appropriate deposit receipt issued by the appellant. Quoting from the book it says:

> In *Douglass v. Lloyds Bank Ltd.,* it was decided by Roche J that a presumption that a debt had been repaid arose after a lapse of some 61 years. The defendants in this case were bankers. In May 1866, a customer of theirs, a Mr. Fenwicke, deposited a sum of 6,000 pounds and was issued with a receipt. The receipt provided that the money deposited could be withdrawn on 14 day's notice and that interest would be paid on the deposit at the rate of 6 percent for the first three months and thereafter at the current bank rate. On the receipt, a sum of 2,500 pounds was stated to have been repaid on 13 August 1866. There was no record of the repayment of the balance of 3,500 pounds. Fenwicke died in 1893. In 1927, a relative found the receipt among some old papers. An action against the bank was brought by the executor of the deceased's estate to recover the balance of 3,500 pounds together with interest.

The bank refused to pay and it raised two main defences. First, that the money had been repaid. Secondly, that there had been such laches on the part of the plaintiff that the action ought to be barred. Roche J decided in favour of the bank on the first ground. His Lordship took into account the fact that Fenwicke who was a very careful man in financial matters was indebted to another bank to the extent of 1,800 pounds at that time. It was therefore unlikely that he would have forgotten about the deposit with the defendant bank. Roche J was of the view that the sum must have been repaid to Fenwicke. His Lordship said:

> On the facts I recognise to the full strength of the fact that the plaintiff produces this deposit receipt, but I cannot ignore what experience tells me, and the evidence in this case shows, that people lose or mislay their deposit receipts at the time when they want to get their money back, and that money is paid over, if they are respectable persons and are willing to give the necessary indemnity or receipt, without production of the deposit receipt; indeed, otherwise life would be intolerable and business impossible. Many people have the misfortune to mislay these documents from time to time and they afterwards very often find them. Accordingly, the production of the deposit receipt is, in the light of those facts, not conclusive in this case, and there is no ground for saying it is a presumption of law which cannot be rebutted. In my judgment that presumption is rebutted by the circumstances of this case.

Assuming in the present case that the said amount had not been withdrawn from the appellant bank. Then the said amount would have remained with the appellant and on the coming into force of the 1965 Act, upon the account becoming dormant, the said deposit would have been remitted to the Registrar and it would have been in the record of the said Registrar but in this case there was none. The next assumption is the appellant must have kept the amount for itself and gave the excuse that its record beyond the ten years period had been destroyed. The learned counsel for the respondent tried to show that the evidence of DW1 on this point had been contradicted by a fresh evidence allowed by the court as contained in Encl. (16). In the affidavit affirmed by DW1 from pp. 6 to 10 in reply to an affidavit affirmed by Tripti Kumar, the counsel for the respondent in support of her application for fresh evidence alleging that the evidence of DW1 in the court below was false and misleading having regard to the content of a certain exhibit marked as "TKJ1", she deposed that it is true that the register of deposit receipts issued and paid was required to be kept only for 10 years. But as regards register of fixed deposits accounts opened and closed, the appellant no longer uses the said old register and admits that the said register ought to be kept permanently. However, the said old register was destroyed in the big flood in 1971 and no longer in the custody of the appellant and this was confirmed when a search for it was made before the trial of the action in the lower court and again for the purpose of the application for additional evidence but to no avail. Be

that as it may, from the general conduct of the appellant in defending this action by the respondent in the court below in going out of its way to counter-check with the Registrar this discrepancy in the evidence of the appellant is not material so as to make it fatal for the appellant's case. This action in the court below was instituted by the respondent. It is for the respondent in order to succeed to establish her case on the balance of probability. It is not for the appellant as a defendant to supplement the lacuna in the evidence of the respondent to assist the respondent to succeed in her claim such as to provide the maturity date, the interest rate, etc. provided for the fixed deposit based on the evidence of the acceptance of the deposit in exh. "P1". She has to satisfy the court on the balance of probability that the said amount stated in exh. "P1" which is not a deposit receipt for a fixed deposit account had not been withdrawn. On the evidence as a whole she had failed to do so. In the circumstances the learned judge in the court below has misdirected himself in assessing the evidence before him in making the decision. His decision is against the weight of the evidence before him. For the reasons given the appeal was allowed with costs to the appellant here and in the court below. The order of the learned judge was set aside and the claim of the respondent was dismissed.